No. 89-1698

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SCHOOL DISTRICT NO. 1, DENVER, COLORADO,
Petitioner,

v.

WILFRED KEYES, *et al.*,

On Petition For Writ of Certiorari To the United States Court of Appeals For the Tenth Circuit

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BRIEF IN OPPOSITION TO CERTIORARI

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RESTATED QUESTION PRESENTED

Whether, where a school district has failed to completely desegregate, the trial court properly exercised its discretion by retaining jurisdiction while relaxing supervision under an Interim Decree, which enjoined the Board to achieve integration under this Court's *Swann* principles without mandating any detailed pupil assignment plan.

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Statement

Respondent pupils and parents have sought the desegregation of the public schools of Denver, Colorado since 1969. After this Court's 1973 opinion in this case,[1]

[1] Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

the District Court on remand found that the school system had been unconstitutionally segregated.[2] When the school board failed to make an acceptable proposal, the court ordered the implementation in 1974 of a desegregation plan designed by the Court's consultant.[3] In a 1975 opinion the Tenth Circuit affirmed the liability finding and modified the remedy to eliminate "part-time" desegregation provisions.[4] This Court then denied review.[5]

In 1976 the trial court approved a stipulated modification of the pupil assignment plan to carry out the appellate mandate, and included an agreed three-

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[2] Keyes v. School Dist. No. 1, 368 F. Supp. 207 (D. Colo. 1974).

[3] Keyes v. School Dist. No. 1, 380 F. Supp. 673 (D. Colo. 1974).

[4] Keyes v. School Dist. No. 1, 521 F.2d 465 (10th Cir. 1975).

[5] 423 U.S. 1066 (1975).

year moratorium on changes of the plan. When the moratorium expired in 1979, the parties returned to Court, because the Board wished to close certain schools. The trial judge ordered certain plan changes and noted the Board's "dereliction" in its duty to propose acceptable desegregation arrangements in order to avoid criticism by putting that burden on the Court. App. B19.[6]

The Board did not appeal the 1979 finding that the system was not "unitary". App. B20. Instead the Board embarked on purported integration planning through the mechanism of the "Ad Hoc Committee." This process was abandoned when the Board, in 1981, proposed its "Total Access Plan." That proposal would have permitted any pupil in the system to attend any school,

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[6] Petitioner's Appendix of Opinions Below, cited herein as "App."

without assignments by the authorities. After a hearing in 1982, the Total Access Plan was rejected with an opinion finding that it would "result in resegregation."[7]

To accommodate a grade reorganization desired by the Board, the Court approved the Board's subsequently presented "Consensus Plan" -- modifying the prior plan -- for one year only in 1982. The court appointed an expert "Compliance Assistance Panel" to assist the Board to develop a more permanent arrangement and to establish a unitary system. The Board obtained a one-year extension of the "Consensus Plan" in 1983 while it supposedly planned assignment revisions. The "temporary plan" remained in effect several more years after adversary litigation resumed in 1984, when the Board rejected the proffered help of the court's panel,

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[7] Keyes v. School Dist. No. 1, 540 F. Supp. 399, 402 (D. Colo. 1982).

declared that the system was already unitary, and moved for dismissal of the case and dissolution of the injunction.

After a 1984 hearing and briefing (and a delay during unsuccessful settlement negotiations), the Court issued an opinion June 3, 1985 which rejected the District's claim that it was unitary and denied the request to dissolve all pupil assignment injunctions.[8] An order of October 4, 1985 required the Board to file a plan to correct four deficiencies:

(1) Correction of resegregation at Barrett, Harrington and Mitchell elementary schools which had been caused by the Board's "Consensus Plan";

(2) Elimination of abuses of hardship and "baby-sitting" transfer policies;

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[8] Keyes v. School District, 609 F. Supp. 1491 (D. Colo. 1985); App B.

(3) Corrections of faculty desegregation practices which had violated the injunction since 1974;

(4) Plans to assure that future school construction, utilization and planning decisions would not reestablish the dual system. App. C1.

The Board appealed the two 1985 orders, but there being no request for a stay, also filed a plan which was considered at a hearing in March 1986. The Court ruled that the Board could proceed with that plan in September 1986 pending an opinion, which was filed February 25, 1987.[9] The Court held that it could not determine in advance whether the Board's proposals would be effective, but it permitted continued implementation of the District's proposals. Because of various uncertainties about the effectiveness of the plans,

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[9] Keyes v. School District, 653 F. Supp. 1536 (D. Colo. 1987); App. D.

such as the fact the District had eschewed any new mandatory pupil assignments to deal with the three elementary schools, choosing instead various measures designed to induce voluntary integration, the Court ruled that it would await the results of the plan before making any final determination. App. D8-9. The plan included such features as a "grade-a-year" magnet plan to integrate Mitchell, cosmetic improvement of buildings and grounds at the three black schools to make them comparable to paired Anglo schools, and strict enforcement of new transfer rules to prevent abuses of the baby-sitting transfer policy. The Court said that the Board should return to court when it was in a position to demonstrate that its proposals had been implemented and were effective. App. D10. The Court rejected the plaintiffs' requests for further injunctive relief, reserving

them for further consideration if the Board's plans proved ineffective. *Id.*

The opinion also said that in the interim, pending the Board's further showing, the Court would reduce judicial supervision of the district and would no longer require the Board to get court approval before changing assignments or other aspects of the desegregation plan. The Court also advised that it would relinquish jurisdiction over the case and enter a permanent injunction as soon as the Board proved the effectiveness of its plans. App. D10-13. The Court found a permanent injunction necessary, among other reasons, because without an injunction the dual system would be re-established under the compulsion of Colorado's Anti-Busing Amendment. App. D11-12.

During the three years since that order, the Board has steadfastly pursued appeals but declined the trial

court's invitation to demonstrate the effectiveness of its plan and thus precipitate the end of the case.[10]

On October 6, 1987, the Interim Decree was issued.[11] The court noted that the interim decree "removes obsolete provisions of existing orders, relinquishes reporting requirements, and eliminates the need for prior court approval before making changes in the District's policies, practices and programs." App. E4. The interim decree supersedes all prior injunctions. The Board is no longer obligated to follow the Finger Plan or any particular plan of pupil assignment. Rather the

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[10] In addition to the language in the opinions so stating, the Court at a status conference on November 13, 1987 made clear that it would schedule a hearing at the Board's request, and that if the Board made a satisfactory showing the court would enter a permanent injunction and end active jurisdiction of the case. See Tr. of Pretrial Conference, Nov. 13, 1987 (Resp. 10th Circuit Addendum at 154-168). Although there have been no stays pending appeal, and years have passed, the Board has not asked for the hearing.

[11] Keyes v. School District, 670 F. Supp. 1513 (D. Colo. 1987). See decree at App. E5-8.

Board is directed to achieve and maintain desegregation under the Interim Decree's principles. In language intended to adopt this Court's *Swann* standard, the Board was enjoined in language modeled on the *Swann* case from "operating schools or programs which are racially identifiable as a result of their actions."[12] An appeal, which was consolidated with the appeal of the 1985 orders, followed.

The Tenth Circuit affirmed the orders of the trial court in most respects, with a remand directing certain changes in the language of the Interim Decree. The Tenth Circuit wrote that "the record evidence adequately supports the court's specific finding that *student assignments* are non-unitary," with the court noting that

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[12] ¶ 2 applies the rule of Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 26 (1971). Where "schools . . . are substantially disproportionate in their racial composition" the board has a burden of showing that the "racial composition is not the result of present or past discriminatory action on their part."

it had conducted its own "independent review of the record." App. A15. Both courts below rejected the Board's arguments that the case was factually like the *Pasadena*[13] case and that resegregation had been caused by demographic change. App. A15. The Tenth Circuit wrote that the existence of racially identifiable schools "especially when they once have been eliminated and then resurface as a result of board action, is strong evidence that segregation and its effects have not been eradicated." App. A15-16. The Board failed to meet its burden of showing that "such schools are nondiscriminatory and that their composition is not the result of present or past discrimination. *Dayton II*, 443 U.S. at 538; *Swann*, 402 U.S. at 26." App. A16. The Tenth Circuit also noted that the "district does not dispute the

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[13] Pasadena Board of Educ. v. Spangler, 427 U.S. 424 (1976).

standard employed by the district court in determining whether a school is 'racially identifiable.'" App. A15, n.3.

Of course two additional grounds upon which the trial court based its continuing jurisdiction were not even challenged on appeal. The Board did not contest the findings that the district was not unitary because of the administration of hardship and baby-sitting transfers and the failure properly to desegregate the faculties. The baby-sitting transfers contributed to resegregation by permitting white pupils to escape former minority schools. App. B43-46; D5. The effect of some of the transfers was to undercut certain pupil assignments and defeat goals of the desegregation plan. The faculty assignment policy continued the concentration of minority teachers in Park Hill and Denver core city schools where the 1960's constitutional violations

occurred, while placing minimal numbers of minority teachers in schools located in Anglo areas.

The Court of Appeals also rejected, with one exception,[14] the Board's arguments that the Interim decree was too vague. The Court specifically held that paragraphs 2, 9(A) and 9(C) should not be interpreted "to require that racial balance in any school or department necessarily reflect the racial proportions in the district as a whole," and cited the *Spangler* case. App. A21. Otherwise, the Court found the order a "commendable attempt to give the Board more freedom to act within the confines of the law," and acknowledged the difficulty in drafting an "injunction that will allow the district maximum latitude in formulating policies, while

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[14] The Court found too vague paragraph 4 of the Interim Decree on the ground that it merely required the district to obey the law. That provision was unchanged from the 1974 Decree which was affirmed in 1975.

at the same time making the injunction sufficiently specific." *Id.* The Court found the Interim Decree sufficiently specific "in light of the difficult subject matter." *Id.* The Court concluded that "in Denver the district has not accomplished all desegregation possible and practical." *Id.* at A22.

REASONS FOR DENYING THE WRIT

I

CERTIORARI SHOULD BE DENIED BECAUSE THE PETITION PRESENTS NO CONFLICT WITH EITHER THE DECISIONS OF THIS COURT OR OF OTHER COURTS OF APPEALS.

A. Some Of The Questions Presented Are Premised Upon Assumptions Which Are Directly Contradicted By The Findings Of Both Courts Below.

1. *In Denver The Transition From A Dual System Is Not Complete.*

   a. The remedial plan in Denver has been accomplished through a series of interim amendments to the 1974 decree.

The Board's assertion as to purported conflicts rests in part upon the false premise that, upon the implementation of the stipulated changes to the 1974 student assignment injunction in 1976, a complete, effective and permanent plan for effecting a transition from a dual system was in place. The Petition expresses

this idea in several ways by stating: (1) that the 1974-76 decrees constituted implementation of ". . . a comprehensive remedial plan . . . ," see Question 1; (2) that ". . . the remedial process of desegregation has been carried to completion," Pet. at 11; (3) that ". . . the judicially prescribed remedy was complete . . . ," *id.* at 12; (4) that ". . . the affirmative duty to desegregate schools has been accomplished . . . ," *id.* at 13; and (5) that ". . . the purposes of the remedial plan have been fulfilled . . . ," *id.* at 14.

No matter how many different self-serving ways the Board describes the situation in Denver, those assertions are directly contradicted by the concurrent findings of both courts below. App. A15 n.2; A22. Those courts determined that the combined 1974-76 decrees were *not* intended to be a "complete" plan because it was known at the time that the integration would be undone by

changes already contemplated by the Board. App. B15; 18-19. Question 1 is thus not presented by this case because the 1974-76 injunction was not in fact "a complete plan" as urged by the Petition.

Similarly, in 1979 the district court with specific reference to *Spangler* disavowed the implementation of a single comprehensive plan intended to be a complete remedy. Instead it characterized its necessary approach as utilizing "the entry of interim orders" to "define and determine the existence of a unitary system so that jurisdiction over the Denver schools may finally be relinquished." 474 F. Supp. 1265, 1271 (D. Colo. 1979).

In 1982, after rejection of its Total Access Plan the Board presented the "Consensus Plan" as a temporary solution. App. B22-23. After a hearing, over plaintiffs' objections that the Consensus Plan would also resegregate schools integrated under the then current

plan, the district court accepted the interim approach, reluctantly approving the plan for only one school year "as an expedient which will accommodate the educational policy decision to move to middle schools . . . ." App. B25. It is thus equally clear that both the Board and the district court did *not* intend the 1982 Consensus Plan as a "comprehensive" or "complete plan," as the Petition contends, but rather as a temporary expedient, where both the district court and all parties contemplated the need for future changes to bring the district into compliance with respect to pupil assignment.

The district court itself in its 1985 opinion recognized and explicitly rejected the Board's assertion that "The 1974 Decree, as modified in 1976, called for a complete and adequate remedy for the segregative effects of Denver's dual system." App. B29, 30-35. It

also reviewed its remedial orders after 1976 and noted their temporary, interim nature. *Id.*

The school board's contention here, that the remedial orders were intended to be complete upon implementation without further review, is *entirely* unsupported in the record and directly contradicted there. In view of this absolute lack of support one wonders how the Board can justify this assertion.

b. The school authorities have disobeyed the injunction as to both pupil assignment and faculty integration and have resegregated schools which were previously integrated.

The Petition's second false premise for the alleged conflicts is the alleged "full compliance" with the district court's remedial orders, also directly contradicted by the findings below.

Those findings show that as to pupil assignment the Board fostered evasion of the injunction's assignments by

its lax administration of permissive policies allowing parent-initiated "hardship" transfers, abuse of which the district court found had adversely affected the level of integration at a number of schools. App. B44-47.

The Court also determined that the substantial changes in pupil assignments effected under the Consensus Plan, as predicted by the plaintiffs, had resegregated a number of elementary schools. The Board's alternative explanation based on demographic change was rejected. App. A14-15. Three such schools, Harrington, Barrett and Mitchell were targeted for relief.

With respect to faculty integration the Court found that since 1974 the District had been in violation of express provisions of the Decree's faculty desegregation requirements (App. B38) and had been interpreting those provisions in such a way as to minimize the representation of minority faculty in previously

predominately white schools (App. B37). Moreover the Court recognized that the earlier order was deficient in that it did not prevent the Board from still concentrating minority teachers in the segregated minority schools of Park Hill and core city Denver. App. B38-41. The Board was required to provide plans and policies which would cure these defects. App. C4.

The foregoing findings hardly support the Board's assertion here of "full compliance" with the district court's remedial orders (Question 1).

The Tenth Circuit had no trouble recognizing as erroneous the Board's assertions as to the "completeness" of the plans (App. A15, n.2) and its full compliance with them (App. A4-5). It considered the numerous reasons underlying the district court's determination that the school district had not attained

unitary status as to pupil assignment,[15] and found them supported in the record. App. A14.

The Court of Appeals also had no difficulty in sustaining the lower court's continued exercise of jurisdiction in requiring a remedy proposal for these vestiges of the dual system and in retaining jurisdiction to see whether the Board's new plans were in fact effective. App. A15-16.

The district court took a similar approach with respect to the efficacy of Resolution 2233 in maintaining integration during the interim decree. The Court declared: "What the District does in the operation of its schools will control over what the Board says in its resolutions." The Petition implies that this

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[15] In this proceeding the Board does not contest the findings below as to its violation of the faculty integration provisions and the adverse impact of parent-initiated transfers on the results of the desegregation plan.

demonstration was the *only* reason the Tenth Circuit upheld continuing jurisdiction (Pet. at 15), but as discussed *supra* that was not the case. Moreover, in a district such as Denver where the transition from a dual system is *not* complete, *Spangler*'s presumption that the Board should be allowed to conduct its own affairs free from judicial supervision obviously does not apply.

c. The asserted conflicts do not exist.

Given the fact that in Denver the remedial plans were never intended to be complete upon inception without further judicial review, that school authorities violated the remedial orders, and that those violations in turn required a remedial effort which is not complete, the asserted conflicts with the decisions in *Morgan* and *Spangler*[16] do not exist. Moreover, "Question 1" is not

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[16] Morgan v. Nucci, 831 F.2d 313 (1st Cir. 1987); Spangler v. Pasadena Board of Educ., 611 F.2d 1239 (9th Cir. 1979).

presented on the facts and findings in this case, concurred in by both courts below.

2. *The District Court's Temporary Replacement Of The 1974-76 Decree With The Interim Decree Was Not Premised On the Unitary Status Of The District.*

The Board, against the express findings of the district court, also attempts to equate that court's decision to vacate the original final decree with an unexpressed finding of unitary status. See Question 2. The petitioner faults the Tenth Circuit because: "It failed or declined to recognize that the very fact of dissolution of the 1976 decree, and the express determination that the school district need no longer follow the Finger Plan, was the equivalent of a finding in 1987 that the district

had become unitary at least as to student assignments." Pet. at 10.[17]

This assertion of an equivalency to unitary status flowing from the decision to utilize an interim decree ignores the district court's express findings, which have uniformly rejected assertions of unitary status since 1976, and it ignores the expressed reasons underlying the decision. Those reasons included the Court's determination that while the District had not yet attained unitary status, the Interim Decree's "principal purpose is to enable the defendants to operate the school system under general remedial standards, rather than specific judicial directives." App. E4. The court's objective was

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[17] The school board similarly attempts to explain the reason for replacement of the original decree as to pupil assignment as there being no further necessity for it because that remedy was complete: ". . . [T]he original remedial order has been fully executed and a court has determined that it need no longer be followed." Pet. at 12. We have dealt with the "completeness" contention earlier.

to see whether, left to its own discretion without specific court formulas and directives, the District could *attain* unitary status. That the Court was not yet willing to completely free pupil assignment from judicial review was reflected in the Interim Decree's provisions relating to that subject. App. A18-19. In opposing this position, the Board argues for a rule embracing a rigid all-or-nothing approach to pupil assignment provisions, which is inconsistent with the flexibility inherent in equitable relief and which finds no support whatsoever in any reported case. Pet. at 12.

B. The Issues Purportedly Raised In Questions 2 and 4 Are Not Presented By This Case, Whose Actual Remedial Processes Conflict With No Other Precedents.

Nothing in the Interim Decree requires periodic adjustments of pupil assignments to maintain racial balance in the schools. Thus the Question 2 assertion of

a requirement "to maintain racial balance in all schools of the district for an indeterminate period of time (and perhaps permanently)" contains a number of hypotheses contradicted by the record.

The first hypothesis presumably is that either or both of paragraphs 4 and 2 of the Interim Decree which required "maintenance" of the desegregated condition and prohibited the operation of "racially identifiable schools" carry the questioned requirement. See Pet. at 13. Yet as a result of the Tenth Circuit's review, both of these contentions have been laid to rest. Paragraph 4 has been stricken. App. A18. Paragraph 2 has been given a gloss which prevents the Board's interpretation. *Id.* at A21.

Contrary to petitioner's assertions there is nothing in the Interim Decree which requires "continuing adjustments in order to preserve racial balance" unless

that imbalance is the result not of demographic change, but the Board's own actions. This provision in no way conflicts with *Pasadena*, *supra*, where the plan *was* complete and this Court struck down a requirement of the maintenance of racial balance where imbalances were the result of demographic changes rather than Board action.

The second hypothesis, as to the indeterminate life of the Interim Decree, hides the fact that it is the *petitioner* here who controls when the district court will hear the issue of the adequacy and effectiveness of its 1987 proposals; when that showing is accepted, the district court stands ready to lift the Interim Decree: "When that has been done, the remedial stage of this case will be concluded and a final decree will be entered to give guidance for the future." App. E4.

Thus the petitioner can trigger the final stage of this case whenever it believes that it can demonstrate that its programs which the court conditionally accepted in 1987 have been effective. Requiring this showing is particularly appropriate because, as the district court noted at the time, the school district chose to use untried techniques, including a "grade-a-year" magnet plan, to reestablish integration, and there was no guarantee that they would in fact be effective. App. D8. "It is precisely because the Board has selected the more subtle methods for inducing change that this court must retain jurisdiction to be certain that those methods are effective." *Id.* at 9. Similarly, it was reasonable to require the Board to demonstrate the effectiveness of its new policies as to baby-sitting transfers and faculty desegregation. Since these matters constitute "unfinished business," requiring this showing from the Board was

entirely reasonable and offends no precedent of which we are aware. The very existence of this unfinished business negates petitioner's assertion that the remedy was already complete. A remedy was put in place in the Fall of 1987, but with its effectiveness remaining to be determined.

The third hypothesis assumes the existence of a permanent decree with hypothetical requirements of periodic adjustments for racial balance. The short answer is that such a permanent decree does not currently exist in this case, and there is no basis for assuming that any permanent relief ultimately provided would include such a requirement.

Thus none of the issues asserted under Question 2 actually exist in this case, and the remedial approach actually adopted by the district court is unremarkable and conflicts with no other precedent.

For the same reasons the issues supposedly described in Question 4, which also attacks alleged injunctive requirements of racially balancing *every* school in the District, are in fact not presented by the decisions below. See App. A20-21.

The remaining issues contained in Questions 3 and 4 relate to the Interim Decree's compliance with Fed. R. Civ. P. 65, which we will now address.

II

CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE INTERIM INJUNCTION WHICH CONFLICTS WITH NO OTHER JUDICIAL DECISION

1. This question of the supposed vagueness of the Interim Decree presents no serious issue beyond that of alleged error, and thus fails to meet the Court's standards for granting certiorari. No conflict among the

Circuits is urged or demonstrated. At most the decree is merely interim in nature; the Board controls its duration, and if left to its own pursuits, the district court will shortly replace the interim decree with final orders which may or may not present the other issues which this Petition prematurely anticipates.

2. If there is any difficulty in framing a less specific injunction, that difficulty has nothing to do with whether or not the new provisions are "replacing a satisfied remedial order . . . ," Pet. at 16, but rather lies in the complexity of the problem.

3. The Board's real position is that there can be no acceptable student assignment or school utilization or construction decree *unless* it speaks in terms of rigid mathematical formulas or specific schools and since the Interim Decree here does not use that approach, it must fail for vagueness. The focal point of this attack is the

injunction's use of the term "racially identifiable," which the district court equated with *Swann*'s "schools which are substantially disproportionate in their racial composition," (*Swann*, 402 U.S. at 26) or "one-race or virtually one-race schools, (*id.*), or schools which are "all or predominately of one race," (*id.*) or "disproportionate racial concentrations," *id.* at 23. App. E5. We doubt that any of these other legal standards from *Swann* would be any more acceptable to petitioner, yet this *is* the correct legal standard, and the district court here did follow it.

4. At footnote 11 the petitioner rails against the injunction's supposed prohibition against *any* racially identifiable school, and ignores the contrary interpretation and instruction of the Circuit Court. *Compare* Pet. at 17, n. 11 with App. A at 21. When it recognizes the Tenth Circuit's interpretation it then

faults it for not enunciating a mathematical formula for the Board to follow. Pet. at 17. Footnote 11 also complains that this provision prohibits the district from having one-race schools which might otherwise be acceptable under *Swann*, but there is no support for this contention. The Board seems to be contending that it is as of right entitled to *some* one-race schools, regardless of their cause, and that this provision takes away this entitlement.

5. The Board then erroneously contends that even though it has not yet eliminated discrimination root and branch in Denver, as this Court's prior opinion required (413 U.S. at 213), it should nevertheless be required only to refrain from intentional discrimination and to be free from any responsibility for the results of its actions. Pet. at 18. This assertion is contrary to the teachings of *Swann*, *Brown II*, and *Dayton II*. See App. A13-14.

6. The Board next contends, somewhat disingenuously in view of the nearly two decades of litigation about its conduct in the remedial stages of this case, that it has no idea of what it can or cannot do in the operation of the District and is subject to "the constant peril of future judicial intervention in the form of contempt proceedings (as well as continued extension of judicial control)." Pet. at 18-19. If the Interim Decree's vagueness leads the Board into an unwitting violation of it, that very vagueness would protect them from contempt, as the Decree would be construed in their favor. See the discussion of this point in the Tenth Circuit opinion, App. A21.

7. While the Board argues that a more "specific" decree would give it clear direction as to future lawful conduct, that assertion itself is sophistry. The combination of factors and considerations that go into

consideration of issues relating to pupil assignment, school construction and utilization, to name just a few topics of everyday school district life are too complex to be captured and prejudged by any rigid formula. To even approach the level of "certainty" desired by the school district would require a decree scores of pages long, with every uncovered or unthought-of hypothetical creating the same type of "peril." It is exactly for this reason that the principled approach chosen by the district court is a far better alternative than the rigid formula approach contended for by the Board. As noted by the Tenth Circuit: 'The degree of specificity may be determined in light of the difficult subject matter." App. A21. The *Swann* opinion recognized the same difficulty in defining the remedy.[18]

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[18] "However, in seeking to define the scope of remedial power or the limits on remedial power in an area as sensitive as we deal with here, words are poor instruments to convey the sense of

There will always be gray areas where countervailing considerations could lead to differing points of view as to the appropriate choice. But in those instances school authorities can always seek guidance from the court. Contrary to the Board's contention the Board does *not* have to act at its peril if it truly is in doubt. *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423 (7th Cir. 1985).

8. The Petition at 19 attempts to make this "vagueness" a problem endemic to any permanent or continuing obligation which follows a determination that the remedy is complete. We believe that question should be left to a later day when such an injunction is in place. That is not the case today, and of course it may not be the case in the future; there is little reason

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basic fairness inherent in equity. Substance, not semantics must govern, and we have sought to suggest the nature of limitations without frustrating the appropriate scope of equity." 402 U.S. at 31.

to grant certiorari today to consider the propriety of injunctive provisions that do not exist. Pet. at 19. When Denver is in fact a school district that has "fulfilled the prescribed remedy for a constitutional violation" the time will be ripe for the courts below to consider what continuing obligations are appropriate. Pet. at 19. Indeed if the Court's opinion in *Oklahoma City* is applicable the courts below will follow it. Thus there is no purpose to be served by holding this Petition to await the outcome in *Oklahoma City*.

III

THE DENIAL OF THIS WRIT SHOULD NOT BE DEFERRED PENDING THE OUTCOME IN THE *OKLAHOMA CITY* SCHOOL CASE

A. Contrary To Petitioner's Assertion There Is No Relationship Between The Issues Accepted For Review In Oklahoma City And The Proceedings Below In Denver.

In *Dowell*,[19] the school district had implemented the plan in 1972,[20] been declared unitary in 1977, and then reverted partially to segregated schools in 1984. In 1977 the district court relinquished jurisdiction but did not dissolve its injunction. No one had appealed those determinations.

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[19] Dowell v. Board of Educ. of Oklahoma City Public Schools, 890 F. 2d 1483 (10th Cir. 1989), *cert. granted*, 58 U.S.L.W. 3610 (U.S. Mar. 27, 1990), No. 89-1080.

[20] Dowell v. Board of Educ., 338 F. Supp. 1256 (W.D. Okla.), *aff'd*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972).

None of the five questions presented in *Oklahoma City* have any direct relationship to the decisions below in *Keyes*. Four of them are premised on the trial court's finding of unitary status in *Dowell* (which never occurred in *Keyes*) and the fifth relates to the applicability of *United States v. Swift & Co.*, 286 U. S. 106 (1932) to the modification or vacation of a desegregation decree following a finding of unitary status.

Since neither court below invoked *Swift* as the basis for refusing to vacate the Denver decree, this issue is also inapplicable to the decisions below in *Keyes*.

The petitioner in *Oklahoma City* seeks the Court's definition of the legal significance of unitary status, both in terms of the school district's continuing duties and the district court's continuing jurisdiction. Those issues are not present in *Keyes* because Denver has not been found to have completed its conversion from the dual system,

either as to pupil assignments and transfers or faculty integration, the most basic components of such conversion.

It is not that the decision in *Oklahoma City* could have no *future* relevancy to *Keyes*, just as it could to any existing school case; but the *Oklahoma City* decision would not result in a determination that either the district court or the Tenth Circuit in *this* case had erred in the decisions below. Therefore, if certiorari is to be granted in *Keyes* it is for reasons totally unrelated to the questions presented in *Oklahoma City*.

Moreover, the conflicts which this Court granted certiorari in *Oklahoma City* to resolve have no relationship to the conflicts asserted in this Petition. This Petition relies on supposed conflicts with *Morgan* and *Spangler*, *supra*, while *Oklahoma City*, concerned with the rules for a school district's unilaterally changing a court-

ordered plan after a unitary finding, is concerned exclusively with asserted conflicting results in *Riddick v. School Bd. of Norfolk*, 784 F. 2d 521 (4th Cir.), *cert. denied*, 107 S. Ct. 420 (1986) and *United States v. Overton*, 834 F. 2d 1171 (5th Cir. 1987). As a reflection of how different the issues are in these two petitions, the Denver Petition does not even argue any conflict with either *Riddick* or *Overton*, and as discussed *supra*, only refers to *Overton* in the context of a final injunction which does not exist in the Denver case. Pet. at 19.

B. **The Denial Of Certiorari Should Not Be Delayed.**

The Denver Petition's assertion that the issues in the two cases are "closely related" (Pet. at 20), borders on the extreme fringes of hyperbole.

In summary, whatever the decision in *Oklahoma City* it will have no impact upon the past conduct of the

Keyes case, since *Oklahoma City* is exclusively concerned with issues which arise after a school district is declared to be unitary. To the extent that this Court's decision in *Oklahoma City* speaks to the *future* conduct of *Keyes*, such as the content of the permanent injunction, it is premature to address those issues in the Denver case. Therefore there is no reason to delay the denial of certiorari in this case. Upon such denial and the return of the case to the district court it is likely that, at the Board's request, the district court will hold a final hearing and take whatever action is appropriate to conclude the case. That process of formulating a permanent injunction and dismissing the case has now been delayed several years by the Board's appeal of the Interim Decree and refusal to attempt to prove the efficacy of its plans.

Conclusion

For the foregoing reasons, Respondents respectfully pray that the writ be denied forthwith.

Respectfully submitted,

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